Mr. Gerard Swain  
Acting Executive Director  
Texas Board of Licensure  
for Nursing Home Administrators  
4800 North Lamar, Suite 310  
Austin, Texas 78756-3177  

Opinion No. DM-160  

Re: Whether, under article 4442d, V.T.C.S., the presence of ex officio members of the Texas Board of Licensure for Nursing Home Administrators is considered in determining whether a quorum of the board is present, and related questions (RQ-310)

Dear Mr. Swain:

You have asked our opinion about sections 3(1) and 8(a) of the Nursing Home Administrators Licensure Act (the "act"), V.T.C.S. article 4442d. Section 3(1) of the act establishes the Texas Board of Licensure for Nursing Home Administrators (the "board") and states that the board "shall consist of nine (9) members." One of the nine members must be a licensed physician; one member must be an educator, a psychiatrist, or a psychologist; four members must be licensed nursing home administrators; and the remaining three members must be representatives of the general public. V.T.C.S. art. 4442d, § 3(1). In addition to these nine members, the statute provides for three ex officio, nonvoting members: the Commissioner of Human Services, or his or her designee; the Commissioner of Health, or his or her designee; and the Executive Director of the Texas Department on Aging, or his or her designee. Section 8(a) authorizes the board to promulgate, alter, or abolish rules and regulations upon approval by a two-thirds majority of the board.

Your questions are as follows:

1. What constitutes a quorum of the Board? Do the ex officio members count toward the quorum?

2. What constitutes a "two-thirds majority of the Board"? For example, if all nine voting members are present at a
meeting, would the required number of votes to adopt a rule be six (6) or seven (7)? If one (1) voting member were absent from a meeting, would the "two-thirds majority of the Board" be based upon the number in attendance (eight [8]) or the number of appointed, approved, and sitting members (nine [9])?

Before answering your first question, we would like to clarify the status of an ex officio board member. An ex officio board member is a person who has become a member of a board by virtue of an elected or appointed office that person holds; no further appointment is necessary. 32A C.J.S. Ex officio at 851 (1964). Ex officio thus refers only to the means by which a person becomes a member of a board. By itself, ex officio membership status does not make an ex officio member inferior to an appointed member.1 Under this particular act, however, ex officio members of the board cannot vote.

With reference to this act, we believe that the legislature did not intend that the ex officio members be counted for purposes of determining whether a quorum is present. The first sentence of section 4(3) of the act provides that "at any meeting a majority of the board shall constitute a quorum." Neither the act nor the Open Meetings Act, to which the board is subject (V.T.C.S. art. 4442d, § 3(11)), state whether ex officio members are included in determining the presence of a quorum.2 See V.T.C.S. art. 6252-17, §§ 1(a), (b), (d); 2. We turn, therefore, to the common law, to which governmental bodies also are subject. Attorney General Opinion DM-95 (1992) at 1-2.

Under the common law, the purpose underlying the concept of a "quorum" is that "when the required number of persons go into a session as a body, the votes of the majority thereof are sufficient for binding action." 74 C.J.S. Quorum at 171 (1951). Thus, "quorum" signifies that number of the members of a body that is legally qualified to transact business by voting. Ramirez v. Zapata County Indep. Sch. Dist., 273 S.W.2d 903, 905 (Tex. Civ. App.--San Antonio 1954); Bedford County

---

1Interestingly, when the legislature adopted the act in 1969, the act did not preclude the ex officio members from voting. See Acts 1969, 61st Leg., ch. 411, § 3, at 1357. The legislature changed the ex officio members' status to nonvoting in 1979. See Acts 1979, 66th Leg., ch. 591, at 1226. We found no legislative history indicating the intent behind this change.

2We note that the act provides that the board also is subject to the Administrative Procedure and Texas Registry Act (APTRA), V.T.C.S. art. 6252-13a. V.T.C.S. art. 4442d, § 3(11). Nothing in APTRA answers your questions.

Accordingly, we believe that this portion of section 4(3) should be interpreted as requiring a majority of the appointed, voting members of the board -- and not the persons holding ex officio, nonvoting positions -- in determining whether a quorum is present. This construction is consistent with the only practical construction of the remainder of section 4(3), which specifies that "[b]oard members shall receive a per diem of $25.00 while engaged in board business together with actual and necessary expenses." Because his or her participation in board business is considered a function of the particular office the ex officio member holds, an ex officio member does not receive a per diem. Thus, "board members" as used in the remaining sentence of section 4(3) of the act does not include persons holding ex officio positions.⁴

³Indeed, construing the statute to require that ex officio, nonvoting members be included in the number necessary for a quorum would be nonsensical. For instance, if the ex officio, nonvoting members were to be included in the quorum calculation, the number of members necessary for a quorum would be seven. If all three ex officio members attended a meeting, along with four appointed, voting members, a quorum would be present, and the board could proceed to conduct business. Despite the presence of a quorum, however, the board could not finally promulgate, alter, or abolish any rules or regulations because the board could not generate a two-thirds majority vote on any issue. See infra p. 4 (explaining number of members necessary to constitute two-thirds majority).

⁴Likewise, section 4(4) of the act requires each "member of the board" to be present for at least one-half of the board’s regularly scheduled meetings held each year. Failure to attend the requisite number of meetings results in the board member’s automatic removal from the board. V.T.C.S. art. 4442d § 4(4). As we discussed supra, an ex officio board member is a member solely by virtue of an elected or appointed office that person holds. In other words, ex officio membership on the board attaches to the person’s office. The officeholder cannot be removed from his or her ex officio position as a result of the officeholder’s failure to attend a certain number of meetings. Thus, "[e]ach
Your second question pertains to section 8(a) of the act, which authorizes the board to promulgate, alter, or abolish rules and regulations upon "approval by a two-thirds majority of the board." In determining the number of votes necessary to constitute a two-thirds majority, the board counts only those members who are qualified to vote, whether or not all qualified members are present at the meeting. See City of Alamo Heights v. Gerety, 264 S.W.2d 778, 780 (Tex. Civ. App.--San Antonio 1954, writ ref'd n.r.e.); 63 A.L.R.3d 1072, 1081-82 (1975). On its face, section 8(a) requires only a "two-thirds majority"; the section does not require two-thirds plus one. Accordingly, if all nine voting members of the board are qualified to vote, the board must promulgate, alter, or abolish a rule or regulation by at least six votes. If fewer than nine voting members are qualified to vote, the board multiplies the number of qualified voting members by two-thirds to determine the number of votes necessary to promulgate, alter, or adopt a rule or regulation.

**SUMMARY**

Under section 3(1) of the Nursing Home Administrators Licensure Act, V.T.C.S. article 4442d, for purposes of determining the number of members of the Texas Board of Licensure for Nursing Home Administrators sufficient to constitute a quorum, the board must base its calculation only on the total number of appointed, voting board members. Ex officio, nonvoting members are not counted for purposes of determining the presence of a quorum. Under section 8(a) of the same act, which requires the board to promulgate, alter, or abolish a rule by a two-thirds majority vote, the board calculates the number of votes needed for a majority by multiplying by two-thirds the number of members qualified to vote (provided that a sufficient number of members are present at the meeting.

---

5Here again, we see that the statute refers to "the board" generally, when such term logically can refer only to the appointed, voting members of the board.

6Of course, a quorum must be present before the board can vote on any proposal. 67A C.J.S. Parliamentary Law § 6(b), at 618 (1978).
to constitute a quorum). For purposes of determining the number of votes necessary to constitute a two-thirds majority, the number of members present at the meeting is irrelevant.

Very truly yours,

Dan Morales
ATTORNEY GENERAL OF TEXAS

WILL PRYOR
First Assistant Attorney General

MARY KELLER
Deputy Assistant Attorney General

RENEA HICKS
Special Assistant Attorney General

MADELEINE B. JOHNSON
Chair, Opinion Committee

Prepared by Kymberly K. Oltrogge
Assistant Attorney General